United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2620

To be argued by:
RICHARD G. ROSENBAUM

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO.

UNITED STATES OF AMERICA,

Appellee,

-versus-

PETER PLAGIANAKOS,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR APPELLANT

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APPELLANT'S BRIEF

QUESTIONS PRESENTED

1. Did the trial judge invade the jury's province and commit reversible error thereby, when in response to a jury note he stated that there was in fact a conspiracy in existence?
2. Did the trial judge when responding to a jury note, marshal the evidence in such a way as to leave the jury with the impression that he believed the Government's version thereby prejudicing the appellant?
3. Should the District Court have granted the appellant's motion to dismiss the indictment on the ground that Government was not ready for trial within six months of the date of the arrest?

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (the Honorable John M. Cannella) convicting the appellant after trial of conspiracy to violate the narcotics laws (21 U.S.C. 812, 841(a)(1)(A), 846) and from the sentence thereon. Said judgment of conviction was duly entered the 27th day of November, 1974 and a Notice of Appeal was duly filed in the court below on the 29th day of November, 1974.

The appellant was given a suspended sentence, three years probation, three years special parole and fined $2,500.00.

TABLE OF CASES

STATEMENT OF FACTS

PRETRIAL

On November 19, 1973, the appellant along with Joseph Casino, John Merola and Alving Sigalow (hereinafter referred to as "Casino", "Merola" and "Sigalow") was placed under arrest by agents of the Drug Enforcement Administration. They were arraigned before a United States Magistrate on November 20, 1973 and on that same day a complaint was filed charging them with violations of 21 U.S.C. Sections 812, 841 (A)(1), 841(B)(1)(A) and 846. (A 4)*

On February 19, 1974 Casino pleaded guilty to a one count information charging him with conspiracy to distribute cocaine, and received a suspended sentence. (T 15)**

On May 3, 1974, a three count indictment was filed charging the appellant with the crimes alleged in the aforementioned complaint. (A 7) In count "one" the appellant was charged with conspiring with Casino and Sigalow to distribute cocaine hydrochloride. (A 7) Counts "two"

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*"A" refers to Appendix.
**"T" refers to the minutes of trial.

and "three" alleged that on November 7th and 19ths respectively of 1973, the appellant possessed cocaine hydrochloride with intent to distribute same. (A 8)

On May 13, 1974 the indictment was placed on the calendar for pleading. When the appellant appeared in court alone on that date for arraignment, he was advised by the judge to obtain counsel but not apprised of his rights under the "Speedy Trial Rules". (A 9-12) The case was then adjourned to May 20th at which time appellant appeared with counsel and pleaded "not guilty".

The Government's statement of readiness was filed May 20, 1974.

On May 30, 1974, the appellant on ten days notice to the Government submitted a motion for an order dismissing the indictment on the grounds that the prosecution had failed to be ready for trial within six months from the date of the arrest and the filing of the initial accusatory instrument. (A 13-14) Upon being advised of the motion, the court on its own initiative waived the ten days required notice and heard argument on the date of submission.*

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*Appellant's moving papers were submitted to the court in the morning. The Government's affidavit in opposition was submitted in the afternoon at which time argument was heard. (A 15-17)

(A 18-25) Without hearing any testimony the court denied the motion off the bench (A 25) and advised counsel for both sides that a memorandum would be filed in due course setting forth the rationale for its decision.

Such a memorandum was filed on June 5, 1974. (A 34-44) In it the court citing Rule 45(a) of the Federal Rules of Criminal Procedure held that since May 19, 1974, the last day of the six month period fell on a Sunday, the statement of readiness filed the following day was deemed timely filed. The memorandum then went on to say that even if Rule 45(a) was inapplicable, the one week interval between May 14th and May 20th during which appellant was without counsel was excludible from the six month period. (A 39-40)

THE TRIAL

At the appellant's trial which commenced October 25, 1974, Casino was the Government's principle witness. His testimony is summarized as follows:-

On November 1, 1973 Casino was visited by Pat Shea an undercover operative employed by the Drug Enforcement Administration. Shea told Casino that he was from Washington,

D.C. and in New York on a business visit and interested in purchasing cocaine. (T 16)

On November 6, 1973 Casino informed Shea that he had some cocaine but that a third party was holding it. Shea telephoned Casino the next day and was told by the latter that the cocaine which he proposed to sell to Shea was in Brooklyn. When Shea called again later that day (November 7th) he was told to come to Casino's residence at 525 Hudson Street in Manhattan.

Sheaarrived at Casino's house shortly after 7 p.m. on November 7th and was told by Casino to wait in the livingroom as the cocaine was not yet available because it was being brought by a "friend" who would be there soon. (T 25)

Approximately thirty minutes after Shea arrived, the "friend" (identified by Casino at the trial as appellant) entered Casino's apartment. To prevent the "friend" from being seen by Shea, Casino pulled a sliding door across the entrance to the livingroom. (T 26) The "friend" then allegedly handed a quantity of cocaine to Casino who after diluting it returned to the livingroom and sold it to Shea for $900. (T 29)

Shea then departed and later that evening, appellant allegedly drove Casino to 55th Street and First Avenue near where Sigalow resided. Casino then went alone up to Sigalow's apartment to see if the latter had any cocaine for sale. The merchandise which Sigalow exhibited was unsatisfactory and Casino left empty handed. (T 30, 33) He was then driven home by appellant.

On November 19, 1973 at 10 a.m., Casino received a telephone call from Shea who said he wanted to buy some cocaine that day. (T 33) Casino then allegedly telephoned the appellant and asked to borrow money to buy cocaine to sell to Shea. (T 34) When Shea called again later that morning he was told by Casino that the latter's "friend" (identified by Casino at the trial as the appellant) would arrive at 1:30 p.m.

At 1:30 p.m., the appellant together with Merola and a female companion arrived at Casino's house. (T 35) Shortly after their arrival, Casino received another telephone call from Shea who again asked when the cocaine was coming. Casino replied that it would take a couple of hours. (T 35) At 4 p.m. Shea called for a third time and was informed by Casino that there was no cocaine yet, but that it would be

available by 6 p.m. Casino then telephoned Sigalow and arranged to buy some cocaine from him. The appellant who was in Casino's apartment when the call to Sigalow was made, supposedly had about $900 with him. (T 38)

After completion of the call to Sigalow, Casino and the appellant got into a car driven by Merola and went up to 55th Street. Casino got out of the car and went alone to Sigalow's apartment and purchased an ounce of cocaine from Sigalow. Casino then returned to where Merola's car was parked and the car with its three occupants (appellant, Casino and Merola) drove off. After the car had proceeded south a number of blocks, it was intercepted by Federal Agents who placed the appellant, Casino and Merola under arrest.* (T 39) At the time of arrest, Casino had the cocaine purchased from Sigalow in his pants pocket. When the arrestees reach DEA Headquarters, Casino dropped the cocaine in front of an elevator in the underground garage.**

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*Merola was never indicted.

**The cocaine was retrieved by the agents and in addition some cocaine was scraped off the car seat.

On the witness stand, Casino was hesitant and unsure of himself and the Government on a number of occasions tried to prop him up by endeavoring to "refresh" his recollection. (T 21, 22, 35, 37)*

On cross-examination Casino conceded that after his arrest he did not implicate the appellant despite requests by agents from the Drug Enforcement Administration to do so, until the agents told him theywould inform the judge of his refusal to cooperate. (A 47, T 47-49) His testimony to that effect is as follows:

Q Some time in November or December of 1973, did you receive any calls from the Drug Enforcement Administration?

A I did, but I don't remember exactly which days.

Q When you received the first calls you didn't implicate Mr. Plagianakos in anything, did you?

A Not to my knowledge.

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*The court advised the jury to keep in mind "that he needed this assistance" (T22, 23) and later on when defense counsel objected to the Government "assisting" the witness with written memoranda, the court responded "I would invite him to do this if I were you. If he changes his answer every other minute, it seems to me that he -- if you want this kept out fine." Counsel then withdrew his objection. (Emphasis supplied) (A 46, T 37)

Q Did any people from the Drug Enforcement Administration tell you that it would go easier on you if you implicated Mr. Plagianakos?

A They said it would go easier on me if I cooperated to the fullest extent.

Q And "to the fullest extent" meant bringing in Mr. Plagianakos, didn't it?

A They wanted -- actually they wanted me to set somebody up or set up Plagianakos -- sell some drugs to him.

Q They wanted you to set up Plagianakos?

THE COURT: No, he didn't say that.

They wanted him to set up someone who would in turn --

MR. ROSENBAUM: Sell drugs to Plagianakos.

THE COURT: That's right.

Q Did there come a time when somebody from the Drug Enforcement Administration, either in December or January, told you that you weren't cooperating with them?

A Yes.

Q Did they intimate to you that if you didn't cooperate with them, you would end up going to jail?

A They said that they would tell the judge that I had not cooperated.

Q And you felt that if they told the judge that, that you would end up with a prison sentence, didn't you?

A I couldn't describe my feeling exactly like that.

Q You were fearful of a prison sentence, were you not?

A Yes.

(A 47, T 47-49)

Casino also admitted on cross-examination that he had made dozens of sales to various individuals. (T 58)

After cross and re-direct examination was completed, the court inquired of Casino as to what remuneration, if any, would have inured to the appellant and whether in fact appellant did receive any money for his alleged role. (T 62-66) Casino's response did not explain how appellant could derive any pecuniary benefit from the transactions and he conceded that he never gave appellant so much as a nickel. (A 48, T 66)

Agent Patrick Shea who testified after Casino roughly corroborated Casino's testimony as to their telephone

conversationsand face to face meetings. (T 70-90)

The next witness after Shea was another agent, David Hoyt, who testified as follows:

On November 7, 1973 at 7 p.m. Hoyt drove Shea to Casino's building. Shea went inside and shortly thereafter Hoyt observed appellant enter the building. (T 102, 103) About fifteen minutes later Shea came back out, got back into Hoyt's car and they drove away.

On November 19, 1973 at 5 p.m. Hoyt while conducting surveillance in front of Casino's building saw appellant, Casino and Merola get into a blue Pinto automobile and drive away. Hoyt followed the Pinto to First Avenue and 55th Street where he saw Casino exit the vehicle, go to 333 East 55th Street and enter the building. (T 106) Hoyt then returned to his car and waited. When he saw the Pinto drive away he followed it to about 23rd Street and Second Avenue where he together with fellow agents placed the three occupants (the appellant, Casino and Merola) under arrest. (T 107)

Agent Marvin Siegel who followed Hoyt on the witness stand covered the same ground as his predecessor with respect

to the events of November 7th and November 19th but with the following additions:

On November 7th, about one-half hour after Shea and Hoyt had driven away from Casino's building, Siegel observed appellant and another individual emerge therefrom, drive to 55th Street, park their car and walk west. (T 120) About thirty minutes later, they returned to their vehicle, drove back to Casino's building and went inside. A few minutes later, appellant came out and drove away. Siegel then followed appellant as far as Seagate, a community in the Coney Island section of Brooklyn. (T 120)

With the exception of Casino, there was no testimony that the appellant possessed, sold or conspired to sell cocaine, nor were any admissions introduced into evidence.

CHARGE, DELIBERATION AND VERDICT

On October 9, 1974 the court delivered its charge to the jury which retired to deliberate at 2:15 p.m. (T 230)

At approximately 5 p.m. the jury sent in a note stating "can't reach verdict". (A 49, T 231) In response

to the note, the court over the exception of defense counsel read a "modified" "Allen" charge. (T 232-234)

At 5:55 p.m. at the request of the jury, portions of Agent Siegel's testimony was read back. (A 50, T 236)

At 8:10 p.m. the jury sent in a note which stated "define conspiracy as it applies to this case". (A 50, T 236)*

In response thereto the court gave additional instructions to the jury (A 50-57, T 236-243) and proceeded to marshal the evidence, stating in part the following:

> "Of course, the government has indicated to you a large number of circumstances which they would suggest to you -- and you don't have to buy this, but if you do find it is based on the facts you may buy it -- clearly indicates that he was not merely a participant; namely, why did he hold that ounce of drugs when Casino brought it back and he said to him in effect 'don't you hold it because you'll use it and there goes the stuff or the thing' as he called it -- I don't remember what the expression was that was used. In addition to that, how come he happened to be there at the

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*It would appear that the jury had already decided to acquit on the substantive counts.

> time these things are happening? How come that car happens to be registered in an address where he lives, where he goes down to Seagate? and various other items of that kind." (A 54, T 240)

Immediately after marshaling of the evidence as aforesaid the court then proceeded to assume the existence of a disputed fact (the existence or non-existence of a conspiracy) by telling the jury the following:

> "But there you have at least two people who are acting in a manner that seems to indicate that a conspiracy existed. That of course does not answer the question about the defendant being a member of it <u>but at least it answer the question whether or not there was a conspiracy which was in existence</u>."(Emphasis supplied) (A 55, T 241)

Appellant's exception to the foregoing remarks and to the aforementioned marshaling of the evidence was duly noted. (A 57, T 243)

After some additional instructions the jury then retired for the last time and shortly thereafter, returned

a verdict of "guilty" on the conspiracy count and "not guilty" on each of substantive counts.

POINT I

THE ASSUMPTION BY THE COURT OF THE EXISTENCE OF THE CONSPIRACY WAS AN INVASION OF THE JURY'S PROVINCE.

It is well settled that a trial court may not usurp "the functions of the jury as a fact finder". United States v. Grunberger, 431 F.2d 1062 at p. 1069 (2nd Cir. 1970); United States v. Lee, 483 F.2d 959 (5th Cir. 1973); United States v. Skinner, 437 F.2d 164 at p. 165 (5th Cir. 1971); Roe v. United States, 287 F.2d 435 p.440 (5th Cir. 1961).

Yet that's exactly what the court did when in effect it told the jury that as a matter of law the conspiracy did in fact exist:

> "But there you have at least two people who are acting in a manner that seems to indicate that a conspiracy existed. That of course does not answer the question about the defendant being a member of it but at least it answers the question whether or not there was a conspiracy which was in existence." (Emphasis supplied) (A 55, T 241)

This was highly prejudicial to the appellant. The existence or non-existence of a conspiracy was a major issue in the case and a question of fact for the jury. Even the Government readily conceded that the existence or non-existence of the conspiracy was a disputed fact. Request number "3" of Government's request to charge stated inter alia "you must be satisfied that the conspiracy did in fact exist . . ." (Emphasis supplied) (A 45) By removing that issue from the jury's consideration, the court committed reversible error. United States v. Grunberger, supra at p. 1069; United States v. Lee, supra.

That this was an extremely close case, is first of all borne out by the course of the jury's deliberations. The first note the jury sent in stated "can't reach verdict". (A 49, T 231) The "Allen" charge which followed had no effect. The subsequent verdict of acquittal on the two substantive counts reflected the jury's doubts about the Government's case.

Secondly, the Government relied heavily on the testimony of Joseph Casino, a convicted drug dealer who had conceded on cross-examination that he had not implicated the appellant until the agent threatened to report his "recalcitrance" to

the judge. (A 47, T 47-49) Casino's failure to explain how appellant could derive any pecuniary benefit from the alleged conspiracy probably added to the jury's skepticism as did his frequent equivocation on the witness stand. (T 21, 22, 35, 37)* Had the jury decided to reject Casino's entire testimony (as it well might have) or portions thereof, it could easily have concluded that in fact the Government had failed to prove the existence of a conspiracy beyond a reasonable doubt.** The court's invasion of the jury's province effectively prevented this possibility.

It should especially be noted that the court's assumption of a disputed fact (the existence or non-existence of a conspiracy) occurred not during the general charge, but in response to the last jury note before the verdict. Thus the remarks in question came at a time when the jury was particularly susceptible to any court suggestion and made conviction on the conspiracy count virtual certainty.***

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*Casino had to have his recollection "refreshed"frequently and the court noted " . . .he changes his answer every other minute. . ." (A46, T 37)

**The acquittal on the two substantive counts indicates that the jury had rejected portions of Casino's testimony.

***The remarks in question were immediately preceded by an unbalanced marshaling of the evidence in favor of the prosecution. (See Point II)

POINT II

THE COURT'S MARSHALING OF THE EVIDENCE WAS PREJUDICIAL TO THE APPELLANT.

In response to the jury's request to "define conspiracy as it applies to this case," not only did the court assume a fact in issue, the existence or non-existence of the conspiracy, but in addition, marshaled the evidence in a manner highly prejudicial to the appellant:

> "Of course, the Government has indicated to you a large number of circumstances which they would suggest to you -- and you don't have to buy this, but if you do find it is based on the facts you may buy it -- clearly indicates that he was not merely a participant; namely, why did he hold that ounce of drugs when Casino brought it back and he said to him in effect, 'don't you hold it, because you'll use it and there goes the stuff or the thing' as he called it -- I don't remember what the expression was that was used. In addition, how come he happened to be there at the time that these things are happening? How come that car happens to be registered in an address where he lives, where he goes down to Seagate? and

various other items of that kind." (T240, A 54)

It is well settled that a trial judge may not question witnesses so zealously as to "give the jury the impression of partisanship or the impression that he believes one version of the evidence and disbelieves or doubts the other". United States v. Grunberger, 431 F.2d 1062, supra at p. 1067; United States v. Persico, 305 F.2d 534, 540 (2nd Cir. 1962). Similarly, it must follow that a trial court should not marshal the evidence so as to leave with the jury the same impression of partisanship. "The influence of the trial judge on a jury is necessarily and properly of great weight and his lightest word or intimation may be received with deference and may prove controlling." Quercia v. United States, 289 U.S. 466 at p. 470; 53 S.Ct. 698 at p. 699 (1933).

The remarks in question on their face improperly suggested to the jury that the court favored the Government's case. They were especially prejudicial to the appellant for two reasons. First of all, they were delivered not as part of the general charge, but rather in response to a final note from the jury requesting a definition of conspiracy as it applies to the instant case. (A 51, T 237) Secondly,

they immediately preceded the statement by the court that the conspiracy existed. (See Point I)

In a close case such as this (see Point I, p. 15, 16) the weighted marshaling of the evidence as aforesaid constituted reversible error.

POINT III

THE GOVERNMENT FAILED TO COMPLY WITH THE SECOND CIRCUIT SPEEDY TRIAL RULES.

The appellant was arrested on November 19, 1974 and indicted on May 3, 1974. The Government filed its statement of readiness May 20, 1974, one day beyond the six month period deadline recited in the speedy trial rule. The indictment should therefore have been dismissed for the Government's failure to comply with the rule. Hilbert v. Dooling, 476 F.2d 355 (2nd Cir. 1973); United States v. Flores, 501 F.2d 1356 (2nd Cir. 1974).

Contrary to the view of the District Court, there is no provision in the speedy trial laws, nor any precedent, which says that if the final day of the six month period falls on a Sunday, it is excluded therefrom. Rule 5, Second Circuit Rules regarding prompt disposition of criminal cases.

The District Court's other contention that the one week period between May 13th and May 20th when the appellant was without counsel was excluded from the six month period, is unsound when applied to the facts of this case. Rule 5b of the Speedy Trial Rules states inter alia as follows:

> "A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his rights under these rules and the effect of his consent." (Emphasis supplied)

A reading of the minutes of May 13th indicates that the appellant was never advised of his rights under the speedy trial rules in accordance with the provisions of Rule 5b. (A 9-12) It therefore follows that the one week period between May 13th and May 19th was not excluded from the six month period. Accordingly, the motion to dismiss the indictment for failure on the part of the Government to proceed within six months should have been granted.

CONCLUSION

For the reasons set forth in Points I, II and III the judgment of conviction should be reversed.

Respectfully submitted,

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